# Public Prosecutor v Karim bin AB Jabar

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–7 OF 2002
GOPAL SRI RAM, SULONG MATJERAIE AND SULAIMAN DAUD JJCA
24 MARCH 2008

*Criminal Law — Dangerous Drugs Act (Malaysia) — s 39B(1)(a) — Trafficking in dangerous drugs — Ingredients of offence — Physical possession — Whether proximity of accused to the drugs a relevant fact — Accused found driving car with dangerous drugs in front passenger seat and car boot — Proper inference for the court to draw*

*Evidence — Circumstantial evidence — Nature of — Whether combined effect of all the circumstances to be taken together*

The respondent was tried in the High Court for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The High Court there made the following findings; (a) the respondent was driving motorcar PDJ 31 that the police party stopped; (b) members of the police raiding party did identify themselves as police officers to the respondent; (c) the respondent put up a scuffle and was promptly placed under arrest; (d) the police did find several packages containing dangerous drugs from the front passenger seat and the boot of the car. However, at the close of the case for the prosecution, the High Court judge acquitted and discharged the respondent without calling for his defence. The prosecution appealed to the Court of Appeal.

**Held**, allowing the appeal and ordering a retrial:

(1) The proximity of the respondent to the drugs at the front passenger seat is a fact relevant to establish actual physical possession. The High Court judge having accepted the prosecution's evidence as to the finding of the drugs, the identification of the police officers and the scuffle, failed to direct himself as to the proximity of the drugs to the respondent (see paras 4 & 6).

(2) In the instant case, the respondent was found conveying the proscribed drugs in the motorcar in question. The quantity of the drugs discovered was far in excess of that he would require for his personal use.

Therefore, the irresistible inference that the High Court judge ought to have drawn from the totality of evidence was that the respondent was conveying the drugs for the purpose of trafficking in it (see para 7).

(3) The statement by the owner of the motorcar did not assist the respondent as it did not in any way explain the presence of the drugs on the passenger seat or in the trunk of the car (see para 8).

(4) On the totality of the evidence adduced by the prosecution in this case, it was incumbent upon the High Court judge to draw the inference that the element of mens rea possession had been prima facie established. It was then for the respondent to give an explanation to rebut that inference. The High Court judge was plainly wrong in failing to do so. As such, the Court of Appeal had to intervene (see para 11).

**Observations:**:

(1) The essence of circumstantial evidence is not the effect of the individual strands of evidence but the combined effect of all the circumstances when taken together (see para 10).

(2) The mental element in a crime must, in the absence of an admission by the respondent, be established through circumstantial evidence from which admissible inferences may be drawn (see para 11).

(3) In mens rea possession, not only must the prosecution prove the factum of physical possession but also the accused person's knowledge of the nature and quality of drugs possessed (see para 11).

**[Bahasa Malaysia summary**

Responden telah dibicarakan di Mahkamah Tinggi untuk kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Mahkamah Tinggi telah membuat penemuan-penemuan berikut; (a) responden telah memandu kenderaan PDJ 31 yang ditahan oleh pihak polis; (b) ahli pasukan polis yang menyerbu telah memperkenalkan diri mereka sebagai pegawai polis kepada responden; (c) responden telah bergelut dan dengan segera ditangkap; (d) pihak polis telah menjumpai beberapa bungkusan yang mengandingi dadah berbahaya di tempat duduk penumpang di hadapan dan but kereta tersebut. Tetapi, di akhir kes pihak pendakwaan, hakim Mahkamah Tinggi telah melepaskan dan membebaskan responden tanpa memanggilnya untuk membela diri. Pihak pendakwaan telah merayu ke Mahkamah Rayuan.

**Diputuskan**, membenarkan rayuan dan memerintahkan perbicaraan semula.

(1) Kedekatan responden dengan dadah di tempat duduk penumpang bahagian hadapan adalah fakta yang releven untuk membuktikan

A milikan fizikal yang sebenar. Hakim Mahkamah Tinggi yang telah menerima bukti pihak pendakwaan berkenaan dengan penemuan dadah, pengecaman pegawai polis dan pergelutan tersebut, telah gagal mengarahkan dirinya berkenaan dengan kedekatan dadah dengan responden (lihat perenggan 4 & 6).

B (2) Selanjutnya, dalam kes ini, responden telah didapati membawa dadah yang diharamkan di dalam kenderaan tersebut. Kuantiti dadah yang dijumpai adalah jauh melebihi daripada yang beliau perlukan untuk kegunaannya sendiri. Oleh itu, inferens yang tidak dapat disangkal yang C hakim Mahkamah Tinggi seharusnya buat daripada keseluruhan bukti adalah bahawa responden telah membawa dadah bagi tujuan untuk mengedar (lihat perenggan 7).

(3) Kenyataan oleh pemilik kenderaan tersebut tidak dapat membantu D responden kerana ia tidak dapat menjelaskan kehadiran dadah di tempat duduk penumpang atau dalam but kereta tersebut (lihat perenggan 8).

(4) Di atas keseluruhan bukti yang dikemukakan oleh pihak pendakwaan di dalam kes ini, ia adalah kewajipan hakim Mahkamah Tinggi untuk E membuat inferens bahawa elemen mens rea milikan telah pun prima facie dibuktikan. Ia kemudian terpulang kepada responden untuk memberikan penjelasan untuk mematahkan inferens tersebut. Hakim Mahkamah Tinggi adalah jelas terkhilaf dalam kegagalan F melakukannya. Oleh yang demikian, Mahkamah Rayuan terpaksa masuk campur tangan (lihat perenggan 11).

**Pemerhatian**:

(1) Intipati keterangan mengikut keadaan adalah bukan akibat daripada G elemen keterangan individu tetapi kesan gabungan kesemua keadaan apabila diambil bersama (lihat perenggan 10).

(2) Elemen mental dalam jenayah mestilah, dalam ketiadaan pengakuan oleh responden, dibuktikan melalui keterangan mengikut keadaan H daripada mana inferens yang boleh diterima dibuat (lihat perenggan 11).

(3) Dalam mens rea milikan, pihak pendakwaan bukan hanya mesti membuktikan factum milikan fizikal tetapi juga pengetahuan pihak tertuduh berkenaan dengan sifat dan kualiti dadah yang dimiliki (lihat I perenggan 11).]

**Notes**

For cases on s 39B(1)(a) Dangerous Drugs Act (Malaysia), see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 320–446.

For a case on nature of circumstantial evidence, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 634.

**Cases referred to**

*Chan Chwen Kong v PP* [1962] MLJ 307 (refd)
*Lim Hock Boon v PP* [2007] 1 MLJ 46 (refd)
*PP v Foo Jua Eng* [1966] 1 MLJ 197 (refd)
*Ong Ah Chuan v PP* [1981] 1 MLJ 64 (refd)

**Legislation referred to**

Dangerous Drugs Act 1952 s 39B(1)(a)

**Appeal from**: Criminal Trial No 45–7 of 1998 (High Court, Pulau Pinang)

*Mangaiarkarasi Krishnan (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.*
*RN Rayer (R Nethaji Rayer & Co) for the respondent.*

**Gopal Sri Ram JCA (delivering judgment of the court):**

**[1]** This is the judgment of the court.

**[2]** The respondent before us was charged for offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). He was acquitted at the close of prosecution's case. The public prosecutor being dissatisfied with that result has appealed to us

**[3]** The brief facts relevant to this appeal are these. On 22 April 1997 at about 4pm, PW3 (DSP Ramli) accompanied by 11 police officers conducted a surveillance in the area surrounding EON, Bulat Dumbar and Lengkok Dumbar in Penang. There was a bus stop at Bukit Dumbar. PW4 (Insp Raja Hafiz) and his team of officers placed themselves at that bus stop. A short while later PW4 saw a BMW motorcar registration number PDJ 31 travelling towards him. After communicating with PW3, PW4 and his team stopped the car. There is no dispute that the respondent was driving the car. There is also no dispute — indeed the judge accepted it as a fact — that the police officers had identified themselves as such to the respondent. It is also not disputed that a scuffle took place following which the respondent was placed under arrest. The police recovered a red plastic package (exh P7) from the front passenger seat of the motorcar. Inside it were found three compressed slabs which PW3 suspected to be cannabis. The boot of the car was also searched. From it was recovered a small white package containing five compressed slabs and a small red plastic package containing two newspaper

packages. From one of these packages, were recovered two compressed slabs and from the other, one compressed slab. Upon subsequent examination by the chemist, it was found that all these slabs contained a total of 10.384 kg of cannabis, a drug proscribed by the Act.

**[4]** Before us it was argued by the learned deputy that the High Court had misdirected itself in acquitting the respondent without calling upon his defence. Our attention was drawn to the following circumstances which, according to the learned deputy, when taken together established a prima facie case against the respondent. In the first place there is the finding of the exhibit on the front passenger seat and in the trunk of the car. The proximity of the respondent to the drugs at the front passenger seat is a fact relevant to establish actual physical possession.

**[5]** In *Public Prosecutor v Foo Jua Eng* [1966] 1 MLJ 197, the accused was charged with assisting in carrying on a public lottery. The evidence showed that the accused had been found by the police in a room, seated about three feet away from a dressing table on which the relevant exhibits were found. The magistrate acquitted the accused. The prosecution appealed. In allowing the appeal, Raja Azlan Shah J (as His Royal Highness then was) said this (at p 197):

> With regard to the mental element, the learned magistrate rightly directed his mind that knowledge or consciousness would depend on the surrounding circumstances. However, he failed to direct his mind adequately on the facts. He directed his mind to the circumstances when the respondent tried to close the door on PW1. But he failed to consider the other circumstance which, taken together, may well be that the element of possession was proved. That circumstance is the physical proximity of the respondent to the exhibit in question.

**[6]** So too here. The learned judge having accepted the prosecution's evidence as to the finding of the drugs, the identification of the police officers and the scuffle, failed to direct himself as to the proximity of the drugs to the respondent. Indeed no where in his judgment, did the learned trial judge address his mind to this fact. There is the added circumstance that the respondent was driving the car from one point to another with the proscribed drugs in it.

**[7]** To the foregoing cumulative facts may be applied the following observation of Lord Diplock in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64, at p 69:

> Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminals courts are very familiar. Generally, in the absence of an

express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible — even if there were no statutory presumption such as is contained in s 15 of the Drugs Act.

**[8]** In the present appeal the respondent was found conveying the proscribed drugs in the motorcar in question. The quantity of the drugs discovered was far in excess of that he would require for his personal use, if any. The irresistible inference that the learned trial judge ought to have drawn from the totality of evidence was that the respondent was conveying the drugs for the purpose of trafficking in it. Unfortunately, the learned trial judge in the court below did not direct his mind along these lines.

**[9]** In opposing this appeal, learned counsel for the respondent has drawn our attention to two matters which he submits constitute a complete answer to the prosecution's case. The first point concerns the statement recorded by the police from the owner of the motorcar in question. The owner could not be found despite the best efforts of the police. Hence his statement was put in. In it the owner provides two answers which the respondent's counsel contends are favourable to the defence. In his first answer the owner says that the respondent took car keys and drove the car away as he was entitled to do. He thought or believed that the respondent was taking the car to be shown to a prospective buyer. In the second answer, he concedes that he has a second key to the car in his office. With respect, we do not find these answers of any assistance to the respondent. For, they do not in any way explain the presence of the drugs on the passenger seat or in the trunk of the car.

**[10]** The second point made by the learned counsel for respondent is this: each individual circumstance relied upon by the prosecution in this case is entirely neutral. That might well be true. However the essence of circumstantial evidence is not the effect of the individual strands of evidence but the combined effect of all the circumstances when taken together. In this context, we need do no more than to quote the following passage of Thompson CJ in *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307 (at p 307):

In the first place we have listened to a careful, accurate and detailed analysis of the evidence against the appellant. That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the convictions. That is very true. It must, however, be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but

A also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

B **[11]** We have not overlooked the fact that the prosecution in this case does not seek to rely on any presumptions to establish the charge against the respondent. The burden on the prosecution is therefore to establish what the cases have described as 'mens rea possession' on the part of the respondent. In other words, not only must the prosecution prove the factum of physical possession but also the knowledge of respondent as to the nature and quality of drug possessed. See *Lim Hock Boon v Public Prosecutor* [2007] 1 MLJ 46 and the cases discussed therein. The mental element in a crime must, in the absence of an admission by the respondent, be established through circumstantial evidence from which admissible inferences may be drawn.

D **[12]** On the totality of the evidence adduced by the prosecution in this case, it was incumbent upon the learned judge in the court below to draw the inference that the element of mens rea possession had been prima facie established. It was then for the respondent to give an explanation to rebut that inference. The learned judge was plainly wrong in failing to do so. As such we have no alternative but to intervene.

**[13]** For the reasons given, this appeal will be allowed. The order of acquittal by the High Court is set aside. The learned judge who tried this case has since retired. Having regard to all the circumstances of this case, we regard the just and proper order to make is to direct a retrial. We do so.

**[14]** The accused shall be remanded in custody until the conclusion of the re-trial. We direct the respondent to be produced before the judge in open court in Penang on 25 March 2008 at 9am for trial dates to be fixed. Priority must be given to this case. Judgment delivered in open court at the conclusion of arguments on 24 March 2008.

*Appeal allowed and ordered for retrial.*

Reported by Andrew Christopher Simon